

No. 77-681

Supreme Court, U. S.

FILED

FEB 17 1978

MICHAEL CODAK, JR., CLERK

In the
Supreme Court of the United States

October Term, 1977

TAX ANALYSTS AND ADVOCATES,
THOMAS F. FIELD,

Petitioners,

v.

W. MICHAEL BLUMENTHAL, Secretary
of the Treasury of the United States, *et al.*,
Respondents.

REPLY BRIEF FOR THE PETITIONERS

THOMAS F. FIELD,
Attorney for Petitioners
Suite 204, 1523 L St. N.W.
Washington, D.C. 20005

TABLE OF CONTENTS

Page

ARGUMENT:

- I. The IRS now admits that it has ~~misapplied~~^{misinterpreted} the tax law, but it claims the right to continue to do so, free of judicial review 2
- II. The respondents have misapplied the law of standing to the circumstances of this case 6

CONCLUSION 9

APPENDIX:

Treasury Department News Release dated January 16, 1978	1a
Internal Revenue Service News Release dated January 16, 1978	5a
Revenue Ruling 78-61	6a
Revenue Ruling 78-62	19a
Revenue Ruling 78-63	26a

(ii)

TABLE OF AUTHORITIES

<u>Cases Cited:</u>	<u>Page</u>
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967)	5
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971)	5
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274, rehearing denied, 430 U.S. 976 (1977)	5
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	6
<i>Florida v. Weinberger</i> , 492 F.2d 488 (C.A. 5) (1974)	7
<i>International Business Machines Corp. v. United States</i> , 343 F.2d 914 (Cl. Cls.) (1965), cert. denied, 382 U.S. 1028 (1966)	9
<i>Merrill v. Kunzig</i> , 476 F.2d 1233 (C.A. 3) (1973)	7
<i>Northwestern Portland Cement Company v. Minnesota</i> , 358 U.S. 450 (1959)	8
<i>Park View Heights Corp. v. City of Black Jack</i> , 467 F.2d 1208 (C.A. 8) (1972)	7
<i>Planned Parenthood of Central Missouri v. Danforth</i> , 428 U.S. 52 (1976)	6, 8
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	7
<i>Simon v. Eastern Kentucky Welfare Rights Organization</i> , 426 U.S. 26 (1976)	8

(iii)

<u>Statutes:</u>	<u>Page</u>
26 U.S.C. Sec. 901	2
26 U.S.C. Sec. 7421	5
26 U.S.C. Sec. 7805(b)	2, 3, 4
 <u>Other Authorities:</u>	
Davis, Kenneth Culp, <i>Administrative Law of the Seventies, Supplementing Administrative Law Treatise</i> , June 1976	6, 7
Revenue Ruling 77-85, 1977-1 Cum. Bull. 12	3
Revenue Ruling 78-61	6a
Revenue Ruling 78-62	19a
Revenue Ruling 78-63	26a

In the
Supreme Court of the United States

October Term, 1977

No. 77-681

TAX ANALYSTS AND ADVOCATES,
THOMAS F. FIELD,

Petitioners,

v.

W. MICHAEL BLUMENTHAL, Secretary
of the Treasury of the United States, *et al.*

Respondents.

REPLY BRIEF FOR THE PETITIONERS

The petition in this case for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit was timely filed, pursuant to an order granting an extension of time, on November 12, 1977. The Respondents' brief in opposition was untimely filed on January 27, 1978. This reply is submitted, pursuant to Rule 24 of this Court, to describe an important intervening development since November 12, 1977, and to respond to arguments first raised in the brief in opposition.

THE IRS NOW ADMITS THAT IT HAS MISINTERPRETED THE TAX LAW, BUT IT CLAIMS THE RIGHT TO CONTINUE TO DO SO, FREE OF JUDICIAL REVIEW.

In their brief in opposition (Br. 8), the respondents argue that the scope of the administrative discretion accorded to the Commissioner of Internal Revenue by Section 7805(b) of the Internal Revenue Code "has little to do with this lawsuit challenging the correctness of rulings issued pursuant to the foreign tax credit provision of Section 901 [of the Internal Revenue Code] . . ." Recent events show that this statement is incorrect. Indeed, this suit now focuses squarely on the degree to which Section 7805(b) confers on the Commissioner of Internal Revenue unfettered and unreviewable administrative discretion. A summary of recent events will show why this is so.

On January 16, 1978, the respondents released a set of press announcements and Internal Revenue Service rulings which admit the correctness of the arguments with respect to Section 901 of the Internal Revenue Code that have been advanced by the petitioners in this case. Those announcements and rulings effectively remove from this case any controverted questions relating to Section 901 of the Internal Revenue Code. Without explicitly referring to this case, the respondents have admitted that the petitioners are correct in their arguments regarding Section 901, and that the Internal Revenue Service has heretofore failed to carry out the intent of Congress with respect to that section. Because of their importance, these rulings and press announcements are reprinted as Appendix A, *infra*.

Under normal circumstances, the belated admission by the respondents that the petitioners are correct on the merits would largely end this case, except as to past years, for which relief is sought in this suit. However, in an unprec-

edented¹ action, the Commissioner of Internal Revenue, while admitting the incorrectness of his prior interpretation of Section 901, has given the private beneficiaries of his mistake almost a full additional year to benefit from that mistake.² In addition, the Kuwaiti, Iranian, and Venezuelan rulings that are challenged in this suit remain fully in effect. Accordingly, the injury to the competitive interests of petitioner Field continues unabated, and the injury to the pub-

¹ By its terms, Section 7805(b) confers on the Commissioner of Internal Revenue power to apply changes in IRS rulings and regulations "without retroactive effect." It does not permit the Commissioner to give prospective effect to an admittedly illegal and erroneous interpretation of the law. It is important, in this connection, to note that the apparently uniform practice of the Service in the past has been to revoke erroneous rulings, *with effect from the date of the announcement of the revocation*. For example, on March 9, 1977, the Service issued Revenue Ruling 77-85, 1977-1 Cum. Bull. 12, to correct prior rulings which had been issued in error. The new ruling was effective for all investments after March 9, 1977. In contrast, the oil rulings challenged in this case have been allowed to remain in full effect through June 30, 1978, and, in practice, they will be fully in effect until January 1, 1979. Section 7805(b) does not appear to provide any warrant for this degree of prospectivity, and no similar prior instance has been discovered by the petitioners.

² The challenged rulings have been revoked by the Commissioner for "taxable years beginning after June 30, 1978." However, judicial notice of the public records of the Securities and Exchange Commission will show that substantially all of the major international oil companies operate on a calendar year basis. This is true, for example, of the "seven sisters," Exxon, Gulf, Mobil, Shell, Socal, Standard of Indiana, and Texaco. Hence, the revocation of the Saudi Arabian and Libyan rulings will not affect them until January 1, 1979, at the earliest. And of course, the Kuwaiti, Iranian, and Venezuelan rulings that are challenged by this suit remain in effect.

lic revenues — which already totals more than \$5 billion since this suit was filed — will continue.³

These developments pose even more starkly than before the ultimate question presented by this case: the extent to which Section 7805(b) of the Internal Revenue Code gives the Commissioner of Internal Revenue unfettered and unreviewable administrative discretion to perpetuate admittedly erroneous and illegal administrative rulings that seriously injure competitive relationships and result in massive federal revenue losses.⁴

This case thus presents for the Court's consideration an extraordinary anomaly in our law relating to the scope of judicial review of administrative decisions. The lower court opinions in this case stand for the general proposition that the decisions of the Commissioner of Internal Revenue are unreviewable by the courts — even when they cause competitive injury and huge revenue losses — so long as the Commissioner gives away federal revenue.

This proposition is contrary to the mainstream of thinking regarding the scope of judicial review of administrative action. Judicial review of agency rules has become the norm, and nonreviewability is the rare exception. Judicial review

³The Treasury Department has recently furnished estimates of the revenue losses attributable to the challenged rulings to the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations. For the periods subsequent to the filing of this suit, the Treasury revenue loss figures are as follows: 1974—\$2,700,000,000; 1975—\$1,700,000,000; 1976—\$1,200,000,000; 1977 and 1978—not yet available.

⁴See footnote 3, *supra*, for the Treasury Department's estimates of the recent revenue losses attributable to the challenged revenue rulings.

is widely considered to be a wise antidote to administrative lethargy and the control of administrative agencies by regulated interests; the courts and administrative agencies are viewed as being engaged in a collaborative effort to implement the will of Congress. In interpreting federal statutes, this Court has gone out of its way to find that judicial review has not been precluded or committed to agency discretion.⁵

There is no reason why the rule should be different in tax cases. Suits such as this call upon the Commissioner of Internal Revenue to collect more revenue, not less, and the strictures of Section 7421 of the Internal Revenue Code are therefore inapplicable. In addition, with the possible exception of military service, the payment of taxes is the most fundamental duty a member of the polity owes to the political community. The maintenance of tax fairness is therefore a proper focus of judicial concern, especially when powerful political interests are able to affect the relevant legislative and administrative processes.

Nor is there anything inherently nonjusticiable about tax controversies. This Court routinely handles federal tax questions and has been the principal federal agency implementing the power granted to Congress by the Commerce Clause to regulate the state taxation of interstate commerce.⁶

It is necessary, of course, that there be a proper party to bring cases before this Court in an adversary context.

⁵See, for example, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

⁶See, for example, *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450 (1959), and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, rehearing denied, 430 U.S. 976 (1977).

Whether such a party can ever exist — in instances in which the Commissioner of Internal Revenue gives away money in an admittedly improper way — will depend to a substantial degree on the interpretation given to the rules of standing in this case. As things are, the Commissioner of Internal Revenue has arrogated to himself unfettered and unreviewable administrative discretion to interfere with competitive relationships and give away federal revenues without judicial review.

II THE RESPONDENTS HAVE MISAPPLIED THE LAW OF STANDING TO THE CIRCUMSTANCES OF THIS CASE.

The respondents argue (Br. 7) that the zone of interest test, which was relied on by the Court below to deny standing to petitioner Field, has been “consistently reaffirmed” by this Court. But the cited materials hardly amount to consistent reaffirmation. It is true that the zone of interest test has on occasion been alluded to by this Court since 1970, but it has not been applied, even in those cases in which it was most relevant.⁷

It is therefore not surprising that most courts and commentators have come to the conclusion that the zone of interest test is dead. As Professor Kenneth Culp Davis has put it in his administrative law treatise, “Probably the most common treatment of the ‘zone’ test is to pay homage to it verbally but to ignore it in substance.”⁸ For this reason,

⁷ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁸ Kenneth Culp Davis, *Administrative Law of the Seventies, Supplementing Administrative Law Treatise*, June 1976, p. 512.

the majority opinion in this case in the Court below cries out for guidance, and that guidance will not be forthcoming absent a decision by this Court.

The respondents also argue (Br. 7) that there is no conflict between the decision of the Court below in this case, and the Eighth Circuit’s decision in *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (1972). This assertion is based on a misreading of the Eighth Circuit’s decision. That Court’s statement that it would “apply the rationale on standing as recently discussed in *Sierra Club v. Morton*, [405 U.S. 727]” referred not to the zone test but to the prudential limitations relating to a plaintiff’s personal stake in the outcome of a suit, the adversary context, and the ripeness of suits for judicial review.

Moreover, the confusion in the courts below does not stop with the *Park View Heights* case. The Third Circuit has gone through the motions of applying the zone test, while stating its opposition to it,⁹ and the Fifth Circuit in a recent standing decision has simply ignored it.¹⁰ There is even more confusion about the nature of the “interest” referred to in the zone test, and still more over how statutes are to be construed in administering the test.¹¹ The

⁹ *Merriam v. Kunzig*, 476 F.2d 1233 (C.A. 3)(1973). Significantly, that case stated that a plaintiff should be allowed to defend the public interest in court, provided that he has suffered injury in fact, even if the statutes involved “were designed to protect no zone of interest within which he falls . . .” 459 F.2d 1183 at 1188. On this basis, it appears that the present petitioners would have standing in the Third Circuit.

¹⁰ *Florida v. Weinberger*, 492 F.2d 488 (C.A. 5)(1974).

¹¹ See generally, Kenneth Culp Davis, *Administrative Law of the Seventies, Supplementing Administrative Law Treatise*, Sec. 22.02-11 June 1976.

zone of interest test is therefore very much in need of clarification or decent burial.

The respondents also advance a variety of arguments regarding the injuries suffered by petitioner Field, in an attempt to bring this case within the ambit of this Court's decision in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). Most of these arguments are inapposite, because *EKWRO* did not involve explicitly pleaded competitive injuries. Indeed, the injuries described in the complaint in this case are far more obvious and direct than the petitioners' injuries that formed the basis for standing in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). As the more recent precedent, *Planned Parenthood* is entitled to more weight than *EKWRO*.

Even more important, however, the factual arguments by the respondents regarding Field's injuries appear to disregard the pleaded facts of this case. For example, the respondents argue (Br. 9) that the price of Field's oil might be affected by price controls, even though the pleadings in this case make it crystal clear that price controls are inapplicable to the production from his well. See the amended complaint, paragraph 4(b). Similarly, the respondents seek to argue (Br. 10) that the price for Pennsylvania grade crude oil is not established by the world market price for oil. This is not the fact, as the complaint makes clear. See the amended complaint, paragraph 18.

Finally, the respondents advance (Br. 10) a generalized argument "that persons whose own taxes are not at issue cannot generally challenge the rulings of the Secretary of the Treasury with respect to third parties." The Respondents attribute this argument to "this Court," although it in fact appears only in the concurring opinion of Justice Stewart in the *EKWRO* case, *supra*.

It is not at all clear that Justice Stewart who advanced this argument in a somewhat speculative way in his *EKWRO* opinion, wished it to be expanded so as to open a gaping hole in our established system of judicial review of administrative decisions. See Argument I, *supra*. Did Justice Stewart really mean to empower the Commissioner of Internal Revenue to forgive, as in this case, more than \$5 billion in federal revenue, through a series of admittedly illegal rulings, to the detriment of thousands of domestic oil producers, without any possibility of judicial review? Did he mean to reverse or abandon the decision with respect to competitor standing in *International Business Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cls. 1965), *cert. denied*, 382 U.S. 1028 (1966)?

Certiorari should be granted so that this Court can speak on these and the other important questions presented by this case. Certiorari should also be granted to bring to an end the harm that petitioner Field, in common with other domestic oil producers, continues to suffer as a result of what now are admitted to be illegal and erroneous actions by the Commissioner of Internal Revenue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS F. FIELD
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Thomas F. Field, attorney for the petitioners and a member of the bar of the United States Supreme Court, do hereby certify that on this 17th day of February, 1978, I served copies of the foregoing reply brief on the attorneys of record for the respondents herein, Wade H. McCree, Jr.; M. Carr Ferguson; Leonard J. Henzke, Jr.; and Richard Farber, by mailing three copies of the same, postage prepaid, to each of them at their offices at the Department of Justice, Washington, D.C. 20530.

Thomas F. Field
Attorney for Petitioners



IMMEDIATE RELEASE
Monday, January 16, 1978

Contact: George Ross
500-2356

TREASURY ANNOUNCES NEW IRS RULINGS ON FOREIGN TAX CREDITS

The Treasury Department today announced the issuance of three Internal Revenue Service revenue rulings concerning the credits that U.S. businesses may take against their U.S. income taxes for taxes paid to foreign countries.

One of these rulings concludes that amounts received by Libya from U.S. oil companies operating in that country are not foreign income taxes and therefore may not be credited against U.S. income taxes. Today's ruling revokes an inconsistent 1968 ruling involving Libya.

Today's ruling also revokes a 1955 IRS ruling on the basis of which payments to Saudi Arabia under a posted price system have been treated as income taxes that may be credited by U.S. oil companies against their U.S. income taxes.

The ruling issued today will take effect for taxes paid or accrued by the companies in their taxable years beginning after June 30, 1976. When an IRS ruling is revoked, the general rule is that the revocation takes effect only for the future. Revocations are not retroactive because taxpayers are entitled to rely on an IRS ruling until the IRS concludes that the ruling is no longer valid.

A principal basis for the conclusion of the ruling is the use of posted prices in computing the companies' tax payments. "Posted prices" are an arbitrary price which exceeds the market price of oil. They have been used to determine the oil companies' income, raising their nominal income and their foreign tax liabilities above the levels that would result from actual market prices.

The IRS has recently received advice that Saudi Arabia may no longer use posted prices in determining taxpayer liability. The IRS has not received detailed disclosure of all relevant

information as to the current system employed by Saudi Arabia and has not been asked to determine the effect that revocation of the 1955 ruling will have on foreign tax credits claimed under a system not involving posted prices.

Foreign income taxes may be credited against income taxes owed to the United States. In determining whether a foreign tax qualifies as an income tax that can be credited against U.S. taxes, the U.S. Supreme Court has held that U.S. standards apply. The IRS ruling finds the Libyan and Saudi Arabian taxes have been in conflict with important U.S. standards of when a foreign tax may be used as a credit:

* The purpose of a foreign income tax must be to reach "net gain" and the tax must be structured so as to be almost certain of doing so. Thus, a foreign levy is not an income tax as defined under United States standards if it is intentionally structured to tax artificial or fictitious income, as is the case with tax systems that use mechanisms such as the posted price.

* A foreign tax can be credited only if it is imposed on income that is "realized." Income under the Libyan system is not "realized" within the meaning of this standard since taxes are imposed even if sales are not made.

Under the ruling issued today, payments under the posted price system could be deducted from gross income in determining income subject to U.S. tax. Before today's ruling, such payments offset, dollar for dollar, taxes the companies would have owed to the United States.

For example, assume that on \$100 of taxable income by U.S. standards the U.S. tax is \$40 and the tax paid to a foreign government is \$65. Prior to the ruling, the foreign tax credit would fully offset the U.S. tax of \$40 (and leave an excess credit of \$25), which could be used against U.S. tax on other lower-taxed oil extraction income from foreign sources, if any. After the ruling takes effect, the U.S. tax would be 48 percent of \$15 ($100 - 65$) or \$7.2, compared to a tax of zero before today's ruling.

Under the conditions that have prevailed in the past, the use of a credit rather than a deduction for amounts paid by U.S. oil companies to Libya and Saudi Arabia resulted in tax benefits of approximately \$600 million in 1974, the most recent year for which data is available. The revocation of the ruling does not imply that the amount of such tax benefits will necessarily be eliminated or reduced. That determination cannot be made without full information about the foreign tax laws that will apply to actual operations in taxpayer fiscal years beginning after June 30, 1974. Also, it is not known if the affected companies could reorganize to avoid the effect of the revocation.

-3-

Although it is not now known if any tax increases will result from the revocation of the 1955 and 1968 rulings, if there were such an increase, it could be absorbed by the oil companies or by the producing countries or passed on in the form of higher product prices. The increase in gasoline prices attributable to the maximum conceivable tax increase would be less than one-tenth of a cent per gallon.

Today's ruling resulted from an extensive general review of the foreign tax credit conducted over the past four years.

Today's decision was made in the normal course of administering U.S. tax laws and the conclusion reached in the ruling was required by statute and court decisions. The IRS's recommendations were reviewed by Treasury Secretary W. Michael Blumenthal before the ruling was issued by IRS Commissioner Jerome Kurtz.

Two other rulings dealing with the issue of when foreign taxes may be credited against U.S. tax liabilities are also being issued today. The first of these denies a tax credit for a mining tax imposed by the Province of Ontario, Canada. The Ontario tax was found in conflict with U.S. standards concerning income taxes:

* The foreign tax on trade or business income must permit the deduction of the generally significant expenses incurred in producing that income. The failure to allow such deductions conflicts with the U.S. rule that income taxes must be designed to reach "net gain."

* The foreign tax must be imposed on the receipt of income by the taxpayer rather than on transactions such as sales or the exercise of a privilege or a franchise such as exploiting natural resources.

The IRS concluded that this tax is an excise or privilege tax, rather than an income tax, and therefore may not be credited against U.S. income taxes.

The third ruling reviews a number of court cases and IRS rulings, reverses outstanding positions allowing credits for certain Haitian, French, Indian and Cuban taxes, and reaffirms an existing ruling allowing credit for a Mexican tax on mineral royalties. This ruling also reviews pertinent court cases and generally discusses the principles of the U.S. foreign tax credit.

Copies of the ruling with respect to Libya and the accompanying rulings are attached to this news release and will be published shortly in the Internal Revenue Bulletin.

Taxpayers who desire guidance as to whether particular foreign taxes are creditable may request a ruling from the Internal Revenue Service in accordance with the procedures of Revenue Procedure 75-1, which is published at 1975-1 Cumulative Bulletin, page 888 and Revenue Ruling 67-308, which is published at 1967-2 Cumulative Bulletin, page 254.

0000

News Release

For Release: 1:05 P.M., Jan. 16, 1978
9:05 P.M. EST

Department of the Treasury
Internal Revenue Service
Public Affairs Division
Washington, DC 20224

Stock Market: Tel. (202) 888-6124
Cables: Tel. (202) 888-6124

IR-1937

Washington, D.C.: Three new rulings relating to the foreign tax credit were today issued by the Internal Revenue Service. These rulings result from the continuing IRS study of the creditability of amounts paid to foreign governments.

The three new rulings (Revenue Ruling 78-61 through 78-63) are attached and will appear in Internal Revenue Bulletin No. 1978-8, dated February 21, 1978.

X X X

PART I

SECTION 901. TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES

66 CFR 1.901-1; Allowance of credit for taxes;
(Also Section 903; 1.903-1.)

Rev. Rul. 78-61

Advice has been requested whether the tax imposed by section 3(1) of the Ontario Mining Tax Act, being chapter 279 of the Revised Statutes of Ontario, 1970, as amended by Chapter 14 of the Mining Tax Amendment Act of 1971 (the Act), is an income tax within the meaning of section 901(b) of the Internal Revenue Code of 1954.

If the profit of a mine located in the Province of Ontario exceeds \$50,000, section 3(1) of the Act imposes an annual tax of 15 percent on all the profit of such mine including the first \$50,000 of such profit.

Section 3(3) of the Act defines the term "profit" as:

- (a) the amount of the gross receipts from the output of the mine during the taxation year; or
- (b) in case the ore, mineral or mineral bearing substance, or a part thereof is not sold but is treated by or for the owner, holder, lessee, tenant, occupier, or operator of the mine, the amount of the actual market value of the output at the pit's mouth; or
- (c) if there is no means of ascertaining the actual market value of the output at the pit's mouth, the amount at which the mine assessor appraises such output;

less the expenses allowed by section 3(3)(d) through (n) of the Act. (Emphasis added.)

The term "pit's mouth" refers to the loading point at the mine's ground level of the conveyor or other transportation facility that delivers a mineral substance to the pick-up point for shipment from the mine property to market or that delivers it to the treatment or manufacturing plant.

The term "output" is defined by section 1(1) of the Act as all mineral substances:

raised, taken or gained from any mine or land in Ontario which (a) have been sold, or (b) have been incorporated in a manufacturing process, or (c) have been treated or partially treated at any mill, smelter or refinery on or off the mining premises from which they were taken, and the product thereof has been sold.

The Act is designed to tax only the profit derived from the extraction of output in Ontario (the "mining function") in contrast with the profit attributable to manufacturing that output (the "manufacturing function") or concentrating, milling, smelting, refining, or otherwise treating that output (the "treatment function"). Because profit from the mining function is essentially the value of output at the pit's mouth reduced by deductions for allowable expenses, it is necessary under the Act to determine the aggregate value at the pit's mouth of output (a) that is sold without treatment or manufacture, (b) that is incorporated in a manufacturing process, and (c) that is treated and then sold.

Output that is sold without treatment or manufacture is described in section 1(1) of the Act as "...mineral substances... which have been sold." Under section 3(3)(a) the value of output sold without treatment or manufacture is the gross sales receipts received therefor. The value of such output is included in computing the mining profit for the taxable year in which the output is sold.

Output incorporated in a manufacturing process is described in section 1(1) of the Act as "...mineral substances... incorporated in a manufacturing process..." The market value at the pit's mouth of such output is estimated pursuant to section 3(3)(b) of the Act. For example, to arrive at "actual market value" of a mineral incorporated in the manufacturing process, the Ontario

mine assessor sometimes takes the actual sales price per ton received by a company from incidental sales of a mineral not incorporated in a manufacturing process or, if none, then an independent arm's length price, and discounts its price, usually not more than 20 percent. The mine assessor then multiplies this discounted figure by the number of unsold tons of the mineral incorporated in the manufacturing process to arrive at the actual market value of such mineral. The market value of the above output is included in computing the mining profit for the taxable year when the mineral is incorporated in a manufacturing process rather than when materials manufactured from such output are sold.

Output that is treated prior to being sold is described in section 1(1) of the Act as "...mineral substances which have been treated or partially treated at any mill, smelter or refinery on or off the mining premises from which they were taken, and the product thereof has been sold." The market value at the pit's mouth of such output is included in computing the mining profit for the taxable year in which such output is actually sold. If no actual market value can be attributed to the output under section 3(3)(b) before treatment, the market value at the pit's mouth of treated output is appraised under section 3(3)(c). The mine assessor is required, under Ontario law, to appraise the market value at the pit's mouth of output that is treated by reducing the sales proceeds of the treated output by: (1) the treatment and marketing costs of the treated output; (2) a 15 percent allowance for depreciation of the treatment equipment; (3) all administrative and general expenses attributable to treatment; and (4) a profit allowance for treatment.

The profit allowance for treatment is a set figure equal to 8 percent of the original cost of the concentrating facilities if output is only concentrated or milled, 16 percent of the original cost of the smelting facilities if output is concentrated and smelted, and 20 percent of the original cost of the refining facilities if the output is concentrated, smelted, and refined. However, the profit allowance for treatment cannot be less than 15 percent or more than 65 percent of the combined net profit from the mining and treatment functions.

Once the value of output sold during the taxable year without being treated or manufactured, the value of output sold during the taxable year that has been treated, and the value of output incorporated in a manufacturing process during that year, are determined, the total value is then reduced by the deductible expenses enumerated in section 3(3)(d) through (n) of the Act.

Expenses that are deductible in computing profit from output in section 3(3)(d) through (n) of the Act are generally similar to deductions allowed under the income tax laws of the United States.

Non deductible expenses under the Act include:

- (1) all development expenses paid or incurred by a mining company prior to a mine's commencing production in Ontario if the mine commenced production prior to January 2, 1965, or if and to the extent the ore taken from the mine was not smelted in Canada;
- (2) any exploration expenses for ascertaining the existence, extent, location, or quality of any mineral deposit paid or incurred prior to the development stage of the mine;
- (3) all expenses incurred for exploration and development work in Ontario that did not result in a producing mine, even though the taxpayer may have had a producing mine somewhere else in Ontario to which these expenses were not connected;
- (4) except for a minor provincial tax on surface property and for sales and excise taxes on the purchase of goods and equipment, all Dominion, municipal, and Province of Ontario taxes including the Ontario Corporate Income Tax;
- (5) any loss on the sale of the property on which the mine is located;
- (6) cost or other depletion including any expense incurred in acquiring the real property on which the mine is located or in acquiring the right to mine, or an option on the right to mine, such mineral deposits;

- (7) all royalties paid in respect of, or for the output of, mines located on private property, including not only payments to a person on account of that person's economic interest in the minerals in place but also payments that would be regarded under Federal income tax law as rent for the use of the land on which the mine is located;
- (8) all interest paid on borrowed money including that paid on bonds issued by the taxpayer at a discount; and
- (9) most expenses for annual shareholder meetings and distribution of notices and reports to shareholders, advertising expenses other than for promoting of sales and recruitment of employees, bank charges for storage of securities, 50 percent of directors' fees and expenses, stock exchange fees, transfer and registration fees, membership fees in chambers of commerce or similar organizations, subscriptions to nonmining publications, and salaries or expenses not directly connected with mining or treatment.

Section 901(b) of the Code generally allows qualifying United States taxpayers to claim a foreign tax credit for the amount of any income, war profits, or excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States. Section 1.901-2(b) of the Income Tax Regulations provides, in part, that the term "foreign country" includes any foreign state or political subdivision thereof.

Section 903 of the Code provides that the term "income, war profits, and excess profits taxes" shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country or by any possession of the United States. Section 1.903-1(a) of the regulations lists the following requirements for a qualifying "in lieu of" tax: (1) that the country has in force a general income tax law; (2) that the taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax; and (3) that such general income tax is not imposed upon the taxpayer thus subject to such substituted tax.

The first question presented is whether the tax imposed by the Act is an indivisible tax or is divisible into separate taxes on three separate tax bases under section 3(3)(a), (b), and (c) of the Act.

Generally, a foreign tax is divisible into separate taxes if it is levied on more than one separate tax base and the tax on each base is separately computed. See Rev. Rul. 74-435, 1974-2 C.B. 102; Rev. Rul. 59-208, 1959-1 C.B. 192, as amplified by Rev. Rul. 63-268, 1963-2 C.B. 208; and Lanman & Kemp-Barclay & Co. of Colombia v. Commissioner, 26 T.C. 582 (1956).

Under the act gross receipts from the sale of output that is not treated or manufactured are added together with the estimated market value of output at the pit's mouth that is incorporated in a manufacturing process and with the appraised market value of output at the pit's mouth that is treated and sold. The total is then reduced by the expenses in section 3(3)(d) through (n) of the Act attributable to the three types of output referred to in section 3(3)(a), (b), and (c) of the Act in arriving at the profit or the base on which the tax is levied. Thus, in computing the mining profit subject to tax under the Act, the value of the three types of output referred to in section 3(3)(a), (b), or (c) of the Act and the expenses attributable thereto are so interwoven as to constitute a single tax base upon which the tax is computed rather than three separate tax bases. Accordingly, the tax imposed by section 3 of the Act is an indivisible tax.

The second question presented is whether the tax imposed by section 3 of the Act qualifies as an "income tax" within the meaning of section 901(b) of the Code.

Whether a foreign tax qualifies as an income tax within the meaning of section 901 of the Code depends on whether that tax constitutes an "income tax" as determined from an examination of the Federal income tax laws of the United States. Biddle v. Commissioner, 302 U.S. 573 (1938), 1938-1 C.B. 309, and Bank of America Nat'l T. & S. Ass'n v. United States, 459 F.2d 513, 518 (Ct. Cl. 1972), cert. denied, 409 U.S. 949 (1972). Thus, the courts have often said that a foreign tax will be considered to be an income tax within the meaning of section 901 only if that tax is the substantial equivalent of the income tax in the United States sense.

See e.g., Commissioner v. American Metal Co., 221 F.2d 134 (2d Cir. 1955); and F. W. Woolworth Co. v. Commissioner, 54 T.C. 1233 (1970), non acq. on another issue, 1971-2 C.B. 4.

Whether a foreign tax is the substantial equivalent of an income tax in the United States sense "depends primarily on the measure of the tax or the tax base." Rev. Rul. 69-653, 1969-2 C.B. 152. Thus, to qualify as an income tax in the United States sense, a foreign tax must, at the very least, satisfy several requirements. Whether these requirements are met is determined by reference to the entire class of taxpayers subject to the foreign tax and not on a taxpayer-by-taxpayer or transaction-by-transaction basis. Bank of America Nat'l T. & S. Ass'n v. United States, and Rev. Rul. 64-260, 1964-2 C.B. 187. Moreover, when a tax is imposed on a limited tax base or on a limited class of taxpayers and the tax includes a provision that violates one of these requirements, then the importance of that aberrational provision is necessarily increased by the limited scope of the tax base or class of taxpayers.

The first requirement relevant to the instant case is that the gain on which the foreign tax is levied must be realized in the United States sense. The United States Federal income tax, a tax of general application, does tax in certain limited situations the constructive or deemed receipt of income. However, as a whole the Federal income tax is imposed on gain actually realized. Eisner v. Macomber, 252 U.S. 189 (1920), 3 C.B. 25. A substantially equivalent degree of realization is required with respect to foreign taxes. Commissioner v. American Metal Co., Keasbey & Mattison Co. v. Rothensies, 133 F.2d 894 (3d Cir. 1943), and Lanman & Kemp-Barclay & Co. of Columbia.

The second requirement relevant to the instant case is that a foreign tax will not be considered to be an income tax in the United States sense unless its purpose is to reach net gain and it is so structured as to be almost certain of doing so. Bank of America Nat'l T. & S. Ass'n v. United States, 459 F.2d 513 (Ct. Cl. 1972); Bank of America Nat'l T. & S. Ass'n v. Commissioner, 61 T.C. 752 (1974). Generally, a foreign tax is almost certain to fall on net gain if levied on income computed in such a manner that it is very unlikely that taxpayers generally subject to that tax will have to pay it when

they have no net gain. See the United States Court of Claims decision in Bank of America Nat'l T. & S. Ass'n v. United States at 524, wherein it was stated that the "...only question is whether it is very unlikely or highly improbable that taxpayers subject to the impost would make no profit or would suffer a loss." See also Allstate Ins. Co. v. United States, 419 F.2d 409 (Ct. Cl. 1969).

Certain foreign taxes on gross dividends, interest, and royalties have been held to qualify as income taxes in the United States sense. See, e.g., Rev. Rul. 73-106, 1973-1 C.B. 343. These taxes qualify because it is presumed that the expenses ordinarily connected with such income will almost never exceed that income. Therefore, a foreign tax imposed on such income will be almost certain of reaching net gain. Bank of America Nat'l T. & S. Ass'n v. United States. Additionally, similar taxes have long been imposed by the United States on dividends, interest and royalties paid to nonresident aliens and foreign corporations (which are not effectively connected with the conduct of a trade or business in the United States) as a basic part of the United States income tax system. See sections 871(a)(1)(A) and 881(a)(1) of the Code. The thrust of these United States tax provisions is realistically directed against net gain or profit. See Bank of America Nat'l T. & S. Ass'n v. Commissioner 61 T.C. 752 (1974).

However, expenses incurred in producing gross trade or business income are not inherently so slight as to insure that they will almost never exceed the amount of that gross income and thus not produce a loss. For this reason a foreign tax on income from engaging in business in the foreign country that does not permit the deduction of the generally significant expenses incurred in producing that income is not almost certain to fall on net gain. Such a tax is not creditable. Cf. Rev. Rul. 74-435, 1974-2 C.B. 204, wherein this rationale was applied to sustain the creditability of a Swiss communal tax on business income. See also Keasbey & Mattison Co. v. Rothensies; and Continental Insurance Co., 40 B.T.A. 540 (1939).

In Keasbey & Mattison Co. v. Rothensies, the court held the Quebec Mining Tax not to be a creditable income tax in part because it restricted allowable deductions only to expenses incurred in the mining operation itself and failed to allow deductions for the significant expenses incident to the general conduct of the mining business. The Court of Claims in Bank of America Nat'l T. & S. Ass'n v. United States interpreted the Keasbey opinion as involving:

...a mining business which obviously could either have lost or made money in any particular year. In that context, it was significant that "the expenses incident to the general conduct of the business, as distinguished from the cost incurred in the mining operation, are not deductible" (133 F.2d at 898); those non-deductible expenses could easily have made the difference between a net profit and a loss. For that business it could not possibly have been said that the tax would always, or almost always, reach some net gain. (Emphasis added.)

The final requirement relevant to the instant case is that in order for a foreign tax to qualify as an income tax in the United States sense, the tax in question must be imposed on the receipt of income by the taxpayer rather than on transactions such as sales or the exercise of a privilege or a franchise, such as exploiting natural resources. Commissioner v. American Metal Co.; Keasbey & Mattison Co. v. Rothensies; and Rev. Rul. 57-62, 1957-1 C.B. 241. Furthermore, a tax, such as an excess tax that is imposed on subjects other than the receipt of income, is not creditable even if the measure of the tax base is net income. St. Paul Fire and Marine Insurance Co. v. Reynolds, 44 F. Supp. 863 (D. Minn. 1942); Motland v. United States 192 F. Supp. 358 (N.D. Iowa 1961); and Rev. Rul. 58-3, 1958-1 C.B. 263.

Whether a tax is a privilege, excise, or income tax must be determined by examining the foreign law in its entirety. Thus, for example, to the extent that a tax is imposed on a tax base that includes a nonrealization event, does not allow for the deduction of expenses, or is a condition for permission to engage in a certain business, then these factors and others, will be considered in determining the nature of the tax. Commissioner v. American Metal Co.; Keasbey & Mattison Co. v. Rothensies; and, Elias Mallouk v. Commissioner 34 B.T.A. 269 (1936).

In the present case, the tax imposed by section 3 of the Act is an indivisible tax imposed on a very limited tax base; that is, it falls on profit from only three items: (1) the sale of mineral output; (2) the incorporation of mineral output in a manufacturing process; and (3) the sale

of treated mineral output. Because section 3(1) of the Act imposes a tax when output is incorporated in a manufacturing process under section 3(3)(b), this indivisible tax, in part, is not imposed on the receipt of realized income in the United States sense in violation of requirements (1) and (3) above.

Also, the tax imposed by section 3(1) of the Act denies or limits the deduction of sufficient expenses in computing profit from the mining function on treated output under section 3(3)(c), on manufactured output under section 3(3)(b), and on output sold without treatment or manufacture under section 3(3)(a), to make it possible for the taxpayer to show a net gain and thus have to pay the Ontario Mining Tax, even though it had a net loss in the United States sense from mining. Thus, the tax is not almost certain of falling on net gain, as the following discussion indicates.

First, a tax free recovery of invested capital has always been a characteristic of an income tax in the United States sense. However, like the Quebec Mining Tax discussed in the Keasbey decision and unlike the Code, the Act allows no deduction for the taxpayer's expense in acquiring the ore body because cost or other depletion, the cost of acquiring the right to mine or an option in the right to mine, and any loss on the sale of the real property on which the mine is located are all nondeductible. Because the Act does not allow a taxpayer to recover the taxpayer's cost (invested capital), it is effectively taxing that capital.

Second, although much of the financing for mining ventures may be derived from loans, the Act prohibits the deduction of all interest expense, regardless of the amount or purpose for which it was incurred.

Third, under Federal income tax law, royalties paid by a mining company to a landowner or other person on account of that person's economic interest in the minerals in place are not included in the mining company's income. However, under the Act, a mining company cannot exclude or deduct from its gross mining profit the royalties it pays to a landowner on account of the latter's economic interest in the minerals in place. Section 3(5)(d) of the Act denies any deduction for such royalties paid in respect of, or for the output of, mines located on private property.

Fourth, the Act permits no deduction either currently or through depletion for any exploration expense incurred for ascertaining the existence, extent, location, or quality of any mineral deposit and paid or incurred prior to the development state of a mine.

Fifth, prior to the 1969 taxable year the Act did not permit through depletion or otherwise the recovery of any development expenses paid or incurred prior to a mine commencing production in Ontario. In 1969, however, section 3(3)(n) was adopted. That section allows a taxpayer to deduct annually 10 percent of the pre-production development costs (but not exploration costs) of a producing mine in Ontario. This deduction is not available, however, to all mining companies, but only to metal mining companies that brought a mine into production after January 1, 1965, and that smelt the ore taken from that mine in Canada. The inability to deduct this significant expense by some mining companies could make the difference between a net gain and a net loss.

In summary, the Act denies or limits the deduction of significant expenses in computing profit from the mining function on treated output under section 3(3)(c), on manufactured output under section 3(3)(b), and on output sold without treatment or manufacture under section 3(3)(a). Accordingly, the tax imposed by section 3(1) of the Act fails to satisfy the second requirement discussed above because it is not almost certain of falling on net gain in the United States sense.

This conclusion is bolstered by the fact that the amount of profit on which the tax is paid in the case of treated output may be artificially inflated or understated by the use of a treatment allowance formula. As previously indicated, this formula is used because the tax imposed by the Act is a tax on the mining function. That is, it is levied only on profit attributable to extraction of output in Ontario (the mining function) as opposed to net profit from the taxpayer's entire operation. Because both a mining and treatment profit may be embodied in the actual receipts from the sale of treated output, to arrive at the market value at the pit's mouth of such output, the Ontario mine assessor deducts, under section 3(3)(c) of the Act, the costs attributable to the treatment function and a profit allowance for treatment. This profit allowance is set at 8 percent of the original cost of the concentrating facilities if output is only concentrated or milled, 16 percent of the original cost of the smelting

facilities if output is concentrated and smelted, and 20 percent of the original cost of the refining facilities if output is concentrated, smelted, and refined. However, the profit allowance for treatment cannot be less than 15 percent or more than 65 percent of the combined profit from the mining and treatment functions.

The use of the set profit allowance may inflate or understate the portion of profit attributable to the mining function. This is because the 65 percent limitation on the amount attributable to treatment assures that at least 35 percent of the gain will be considered as attributable to the mining function. This would be the case even when no portion of gain from treated output was actually attributable to the mining function. Under these circumstances it cannot be said that the tax is almost certain of falling on net gain from the mining function.

Regarding the third requirement of an income tax discussed above, the court in Keasbey held that a Quebec mining tax was a tax upon the mining privilege or an excise tax as opposed to an income tax. The court said that the tax, although designated as a tax on annual profits, is in reality a tax on the mining privilege, measured on the basis of gross value of the output determined under a prescribed formula, less certain deductions, and that the value of the mining output was the basis of the levy independent of either realization of gain or derivation of profits.

Although the tax imposed by the Act is levied upon a base designated as profit, the fact that the tax fails to meet the United States realization and net gain requirements, as heretofore outlined, and the fact that the tax is structured to yield taxable profit from the extraction of output (the mining function) by a formula shifting of profit derived from treating that output (the treatment function), indicate that such tax is actually a production or severance tax on the mining privilege, such as the Quebec Mining Tax in the Keasbey case. This view is supported by the fact that the Act forbids the mine operator from carrying away from the mine any ore until the weight thereof has been correctly ascertained and entered in the books of account, and the fact that the mine's assessor can enter any mine to take samples for the purpose of determining the value of the ore.

Accordingly, for the above reasons the tax imposed by the Act is not the substantial equivalent of an income tax within the meaning of section 901(b) of the Code.

The final question is whether the tax imposed by section 3(1) of the Act is a tax in lieu of an income tax within the meaning of section 903 of the Code and the regulations thereunder.

Section 1.901-3(a)(3) of the regulations provides, in general, that a credit may be claimed under section 901 of the Code for a section 903 tax if the taxpayer is not subject to the foreign country's general income tax but is subject to a substituted tax. In addition to the tax imposed by the Act, Ontario has in force both corporate and personal income tax laws of general application that are imposed on profits from mining operations. Therefore, because the tax imposed by the Act is imposed in addition to, instead of in substitution for, a general income tax law, the tax imposed by the Act does not satisfy the requirements of section 1.903-1(a) for an in lieu of tax that would be creditable under section 901. Allstate Ins. Co. v. United States, and F. W. Woolworth.

PART I

SECTION 901.--TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES

26 CFR 1.901-1: Allowance of credit for taxes.
(Also Section 7805; 301.7805-1.)

Rev. Rul. 78-62

The Internal Revenue Service has been asked to reconsider a number of its published revenue rulings and acquiescences relating to the creditability of certain foreign taxes under section 901 of the Internal Revenue Code of 1954. Accordingly, the purpose of the instant Revenue Ruling is to review those prior published positions of the Service and to indicate what the position of the Service is with respect to those prior published revenue rulings and acquiescences.

Whether a foreign tax qualifies as an income tax within the meaning of section 901 of the Code depends on whether that tax constitutes an "income tax" as determined from an examination of the Federal income tax laws of the United States. Biddle v. Commissioner, 302 U.S. 573 (1938), 1938-1 C.B. 309, and Bank of America Nat'l T. & S. Ass'n. v. United States, 459 F.2d 513, 515, 518 (Ct. Cl. 1972), cert. denied, 409 U.S. 949 (1972). Thus, the courts have often said that a foreign tax will be considered to be an income tax within the meaning of section 901 only if that tax is the substantial equivalent of an income tax in the United States sense. See, e.g., Commissioner v. American Metal Co., 221 F.2d 134 (2d Cir. 1955); F. W. Woolworth Co. v. Commissioner, 54 T.C. 1233 (1970), nonacq. on another issue, 1971-2 C.B. 4.

To qualify as an income tax in the United States sense, a foreign tax must satisfy certain requirements. See Rev. Rul. 78-61, 1978-8 I.R.B. . The first requirement relevant to this Revenue Ruling is that the gain on which the foreign tax is levied must be realized in the United States sense. The United States Federal income tax, a tax of general application, does tax in certain limited situations the constructive or deemed receipt of income. However, as a whole, the Federal income tax is imposed on gain actually realized. Eisner v. Macomber, 252 U.S. 189 (1920), 3 C.B. 25. A substantially equivalent degree of realization is required with respect to foreign taxes. Commissioner v. American Metal Co., 221 F.2d 134 (2d Cir. 1955); Keasbey & Mattison Co. v. Rothensies, 133 F.2d 894, 898 (3d Cir. 1943); and Lanman & Kemp-Barclay & Co. of Colombia, 26 T.C. 582 (1956).

In addition to realization, the second requirement relevant to the instant case is that a foreign tax will not be considered to be an income tax in the United States sense unless its purpose is to reach net gain and it is so structured as to be almost certain of doing so. Bank of America Nat'l T. & S. Ass'n. v. United States; Bank of America Nat'l T. & S. Ass'n. v. Commissioner, 61 T.C. 752 (1974). Generally, a foreign tax is almost certain to fall on net gain if levied on income computed in such a manner that it is very unlikely that taxpayers generally subject to that tax will have to pay it when they have no net gain. See the United States Court of Claims decision in Bank of America Nat'l T. & S. Ass'n. v. United States at 524, wherein it was stated that the "... only question is whether it is very unlikely or highly improbable that taxpayers subject to the impost would make no profit or would suffer a loss." See also, Allstate Ins. Co. v. United States, 419 F.2d 409 (Ct. Cl. 1969).

The final requirement relevant to the instant case is that in order for a foreign tax to qualify as an income tax in the United States sense, the tax in question must be imposed on the receipt of income by the taxpayer rather than on transactions such as sales or the exercise of a privilege or a franchise, such as exploiting natural resources. Commissioner v. American Metal Co.; Keasbey & Mattison Co. v. Rothensies; and Rev. Rul. 57-62, 1957-1 C.B. 241.

Herbert Ide Keen v. Commissioner, 15 B.T.A. 1243 (1929), acq., VIII-2 C.B. 27 (1929), involved a French tax imposed solely on the French source income of individuals who maintain a residence in France but are not domiciled there (non-domiciliaries). These non-domiciliaries pay the aforementioned tax on estimated income fixed at a sum equal to seven times the presumed rental value of their respective residences in France, unless their actual French source income exceeds their estimated income. If so, the tax will be computed on their actual income.

The tax paid by non-domiciliaries is separate from the tax paid by individuals who are domiciled in France. The latter pay a tax on their actual income from all sources and not some form of estimated income.

The United States Board of Tax Appeals held this French tax on estimated income to be a creditable income tax principally because it was an income tax under French standards. Relying on the decision in the Keen case, the Board reaffirmed the creditability of that French tax in James R. Hatmaker v. Commissioner, 15 B.T.A. 1044 (1929) (decided for the Commissioner on other grounds). However, subsequent to the Keen and Hatmaker decisions, the Supreme Court of the United States held in the Biddle case that in order for a foreign tax to qualify as a creditable income tax, it must satisfy the United States standard and not the foreign standard of an income tax.

It is apparent that the aforementioned French tax on estimated income does not satisfy any of the United States standards of an income tax discussed above. Such tax is imposed on estimated income fixed at seven times the presumed rental value of a residence even if the non-domiciliary has not realized any gain from French sources or even if such gain as may have been realized is less than such estimated income. Thus, the Service is withdrawing its acquiescence in the Keen case and substituting a nonacquiescence therefor, see 1978-8 I.R.B. . Accord, Commissioner v. American Metal Co., wherein the court stated that Keen is in conflict with the later decision of Biddle. In addition, the Service will not follow the conclusion expressed in the Hatmaker case that the French tax is a creditable income tax.

Also decided prior to the Biddle case was Burk Bros. v. Commissioner, 20 B.T.A. 657 (1930) (decided for the Commissioner on other grounds). In that case the taxpayer, a domestic corporation that manufactured goat skins into leather, purchased some goat skins in India through its Indian office. As a result, India levied a tax on the income deemed to be derived by the taxpayer from the goat skins. This income was determined by multiplying the number of goat skins purchased by the difference between the average sales price of goat skins in Philadelphia and their average sales price in Calcutta. The resulting figure was reduced by certain transportation and skin preservation expenses. The Board of Tax Appeals held the Indian tax to be creditable. However, because the tax in Burk Bros. was triggered by a purchase and was levied without reference to the amount of income, if any, actually realized by the taxpayer during the year, it does not satisfy the first and third requirements of an income tax discussed above. Accordingly, the Service will not follow the holding in the Burk Bros. decision that the Indian tax is a creditable income tax.

Rev. Rul. 272, 1953-2 C.B. 56, involved a Haitian tax imposed at progressive rates under chapters III, IV, and V of the Haitian statute. Chapter III taxed the business income of associations, companies, corporations, except stock companies, individual or partnership enterprises, manufacturers, merchants and professional people. Income for purposes of chapter III was computed on a fixed-rate basis by multiplying by five the yearly rental value of the buildings and land occupied by the aforementioned taxpayers.

Chapter IV of the Haitian statute taxed the net profit of all partnership or individual enterprises, companies, and stock corporations conducting a business. For purposes of chapter IV, net profit was actual receipts less the ordinary and necessary expenses incurred in producing these receipts. Taxpayers who were subject both to the tax on net profits under chapter IV and the tax on income computed on a fixed-rate basis under chapter III were required to pay the net profits tax only on that portion of the net profit, if any, which exceeded the income computed on a fixed-rate basis under chapter III. Moreover, even if a taxpayer with this dual liability had no net profit, it still had to pay a tax on income computed on a fixed-rate basis.

Relying on the decision in the Keen case, Rev. Rul. 272 held that the tax imposed by chapter III on income computed on a fixed-rate basis qualified as a creditable income tax. The Revenue Ruling also concluded that the tax imposed by chapter IV was a creditable income tax. The tax imposed by chapter III is not triggered by a realization event in the United States sense and is levied on a base that is not computed from actual receipts. Therefore, the chapter III tax fails to qualify as a creditable income tax. Moreover, insofar as the chapter IV tax is concerned, the only creditable portion of such tax is that portion that exceeds the tax imposed under chapter III. Accordingly, Rev. Rul. 272 is modified to eliminate the holding thereof that the tax imposed by chapter III of the Haitian tax is a creditable tax and to provide that a taxpayer may treat as a creditable income tax only that portion of the chapter IV tax that exceeds the taxpayer's tax under chapter III. However, the holding in Rev. Rul. 272 that the tax imposed by chapter V of the Haitian statute is creditable is reaffirmed because it is the substantial equivalent of an income tax in the United States sense.

Rev. Rul. 59-192, 1959-1 C.B. 191, and Rev. Rul. 56-658, 1956-2 C.B. 501, dealt with certain Cuban taxes on unrealized net income expected to be derived by sugar mill owners from processed sugar. The event that triggered the imposition of the taxes was the manufacture of the sugar and not its subsequent sale. Moreover, the net income of the sugar mill owners was computed by multiplying the amount of sugar produced in the mill by the average market price of sugar produced in the mills for the past three years and then reducing this figure by an arbitrary 60 percent figure to cover processing costs. Because the Cuban taxes in Rev. Rul. 59-192 and Rev. Rul. 56-658 were imposed independently of any realized gain, they do not satisfy the United States realization standard. Moreover, if a sugar mill subject to the Cuban taxes had a loss for any year by United States standards, it would still pay the tax because net income by Cuban standards is 40 percent of the average market price of sugar produced by the mill for the past three years. Therefore, the taxes fail to meet the second United States standard that the foreign tax must be almost certain of falling on net gain. For these reasons the Cuban taxes are not creditable income taxes. Accordingly, Rev. Rul. 59-192 and Rev. Rul. 56-658 are revoked.

In Santa Eulalia Mining Co. v. Commissioner, 2 T.C. 241 (1943), acq. 1946-1 C.B. 4, the United States Tax Court held that a Mexican tax of 10 percent imposed by Articles 26(I) and 27, Chapter IV, Third Schedule, of the "Ley del Impuesto sobre la Renta" is a creditable income tax under a predecessor of section 901 of the Code. The "Ley del Impuesto sobre la Renta" (Law) imposed a series of schedular taxes on various classes of taxpayers. The First Schedule of the Law imposed a tax on taxpayers engaged in commerce, industry, and agriculture and thus would include taxpayers actively engaged in the conduct of a mining business in Mexico.

Article 26(I) of the Third Schedule of the Law imposed a modified gross income tax on "(t)axpayers who . . . receive participations, whether in the form of rentals or otherwise, from the exploitation of the subsoil or concessions granted by the Federal or state Governments or Municipalities." The amount of participations subject to tax are the gross amount received, less a limited number of deductions as set forth in regulations issued under Article 27. However, persons who are actively engaged in the mining business in Mexico, " . . . taxpayers whose income consists of a participation in the profits of the exploiting concern. . .," are specifically excluded from Article 26(I) of the Third Schedule of the Law because they pay tax under the First Schedule of the Law. Thus, only taxpayers not engaged in the conduct of a mining business in Mexico who receive participations are subject to the tax imposed by Article 26(I).

Though the tax imposed by Article 26(I) falls on the gross amount of participations received by the above taxpayers as reduced by a limited number of deductions, the tax does not violate the third requirement of an income tax discussed above. Because the above taxpayers are not engaged in the conduct of a mining business in Mexico, it is presumed that the expenses ordinarily connected with such participations and incurred by such taxpayers will almost never exceed the income from such participations. Therefore, the foreign tax imposed on such participations as reduced by the aforementioned deductions will be almost certain of reaching net gain. Bank of America Nat'l T. & S. Ass'n v. United States, and Rev. Rul. 73-106, 1973-1 C.B. 343, holding a Mexican tax imposed on the gross amount of royalties received by nonresident aliens and foreign legal entities not established in Mexico to be a creditable income tax. Additionally, similar taxes have long been imposed by the United States on dividends, interest, and

royalties paid to nonresident aliens and foreign corporations (that are not effectively connected with the conduct of a trade or business in the United States) as a basic part of the United States income tax system. See sections 871(a)(1)(A) and 881(a)(1) of the Code. The thrust of these United States tax provisions is realistically directed against net gain or profit. See Bank of American Nat'l T. S. Ass'n. v. Commissioner, 61 T.C. 752 (1974).

Accordingly, because the tax imposed by Article 26(I) and 27 of the Third Schedule of the Law is the substantial equivalent of an income tax in the United States sense, the Service reaffirms its acquiescence in the decision in Santa Eulalia Mining Company.

Pursuant to the authority contained in section 7805(b) of the Code, this Revenue Ruling will not be applied to taxable years beginning before January 16, 1978, with respect to taxpayers who have relied on Rev. Rul. 59-192, Rev. Rul. 56-658, and Rev. Rul. 272, but only insofar as the specific taxes discussed in those Revenue Rulings are concerned.

Rev. Rul. 272 is modified. Rev. Rul. 59-192 and Rev. Rul. 56-658 are revoked.

PART I

SECTION 901.--TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES

26 CFR 1.901-1: Allowance of credit for taxes.
(Also Sections 903, 7805; 1.903-1, 301.7805-1.)

Rev. Rul. 78-63

The purpose of this Revenue Ruling is to reconsider Rev. Rul. 68-552, 1968-2 C.B. 306, and Rev. Rul. 55-296, 1955-1 C.B. 386. Rev. Rul. 68-552 held the "surtax" paid to Libya under Article 14(1)(a) of Libyan Petroleum Law No. 25 of 1955, as amended through Nov. 20, 1965, to be a creditable income tax under section 901 of the Internal Revenue Code of 1954. Rev. Rul. 55-296 held that amounts received by Saudi Arabia under Royal Decree No. 17/2/28/3321, dated November 4, 1950, and under Royal Decree No. 17/2/28/7634, dated December 27, 1950 are creditable income taxes.

Rev. Rul. 68-552

Article 1(1) of Libyan Petroleum Law No. 25 of 1955, as amended through January 1, 1975 (hereinafter "Petroleum Law") provides that all underground oil and gas in Libya is the property of the Libyan government.

Article 1(2) of the Petroleum Law provides, in part, that no person shall mine or produce petroleum unless authorized by a concession issued under that Law.

Article 14(1) of the Petroleum Law and Clause 8(1) of the Second Schedule (Standard Form Deed of Concession) to that Law, specify that an oil company or other concession holder under the Petroleum Law shall pay such income tax and other taxes and imposts as are payable under the laws of Libya.

All-companies engaged in business in Libya must pay a company income tax. See Articles 1 and 93-104 of Part II of Law No. 64 of 1973, effective Oct. 1, 1973, as amended through December 1975 (hereinafter "Company Tax"). Prior to the effective date of this law such companies were subject to a company income tax substantially similar to the above law. See, Articles 1 and 89-99 of Income Tax Law No. 21 of 1968.

In addition, Article 14(1)(a) of the Petroleum Law, and Clause 8(1)(a) of the Second Schedule to the Petroleum Law, require that if the total annual amount of fees, rents, income tax, and other direct taxes except royalties equal to 16.67 percent of the value of crude oil exported, paid or payable by a petroleum concession holder to Libya, falls short of 65 percent of its profits from all its Libyan petroleum concessions, such concession holder must pay Libya such sum by way of "surtax" as will make the total of its payments equal 65 percent of its profits. Thus, this provision guarantees Libya at least a 65 percent share of each concessionaire's profits.

"Profits" are defined as the income resulting from the operations of the concession holder in Libya after deducting (1) operating expenses and overhead, (2) depreciation of all physical assets in Libya, (3) amortization for all other capital expenditures in Libya, (4) exploration and prospecting expenses, (5) intangible drilling costs, and (6) royalties not mentioned in Article 14(1)(a) of the Petroleum Law. Article 14(2), (3), and (4) of the Petroleum Law, and Clause 8(2), (3), and (4) of the Second Schedule to that Law. No deduction is allowed for interest or expenses incurred in organizing and initiating petroleum operations in Libya prior to receiving a concession from the government and for fees, rents, income tax, and other direct taxes mentioned in Article 14(1)(a).

Article 14(5)(a) and (b) of the Petroleum Law, and Clause 5(a) and (b) of the Second Schedule to that Law, further define "income resulting from the operations of the concession holder in Libya" as follows:

- (a) In relation to crude oil exported by the concession holder from Libya: total gross receipts realized by the concession holder from such export, and such receipts shall not be less than the amount which results from multiplying the number of barrels of such crude oil exported by the applicable posted price per barrel of such crude oil less [certain marketing allowances as discussed below]
- (b) In relation to other operations of the concession holder in Libya the income to be ascertained in a manner to be agreed between the concession holder and the Ministry of Petroleum.

The value of petroleum and natural gasoline taken as a royalty in kind under Article 13 of the Petroleum Law shall be deemed to form part of such income. [Emphasis added.]

The term "posted price" is defined as

. . . the price f.o.b. Seaboard Terminal for Libyan crude oil of the gravity and quality concerned arrived at by reference to free market prices for individual commercial sales of full cargoes and in accordance with the procedure to be agreed between the concession holder and the Ministry of Petroleum or if there is no free market for commercial sales of full cargoes of Libyan Crude Oil, then posted price shall mean a fair price fixed by agreement between the concession holder and the Ministry of Petroleum. . . . [Article 14(5) of the Petroleum Law.]

Prior to 1965, Libya permitted oil companies to reduce the posted price by certain marketing discounts in computing their "surtax" under Article 14(1)(a) of the Petroleum Law. See Article 15 of Petroleum Reg. No. 6, dated December 21, 1961. The resulting net price figure was approximately equal to the actual price that an unrelated purchaser would ordinarily pay for a barrel of Libyan crude oil (hereinafter "market price"). However, in 1965, Libya began to eliminate these discounts, thereby assuring that the "surtax" would be computed on the basis of posted prices set in excess of actual market price. See, Clause 8(5)(a) of the Second Schedule to the Petroleum Law. Thereafter, Libya exercised increasing control over the level of posted prices and subsequently assumed total responsibility for fixing those prices. The posted price is an arbitrary value placed on a barrel of crude oil for the purpose of computing a foreign oil concessionaire's tax under Article 14(1)(a) of the Petroleum Law.

Except for some differences not here relevant, the "surtax" imposed by Article 14(1)(a) of Libyan Petroleum Law is essentially identical to the "surtax" imposed by Article 14(1)(a) of Libyan Petroleum Law No. 25 of 1955, as amended through Nov. 20, 1965.

Some foreign oil concessionaires sell Libyan oil directly to unrelated parties at the market price even though under either version of the Petroleum Law they are required to pay the above "tax" on a base measured from the posted price. Others sell the oil to purchasing affiliates at the posted price. These affiliates then resell the oil at the market price and regularly suffer losses equal to the difference between the posted and market price.

Foreign oil concessionaires must also pay Libya a per barrel royalty currently fixed at 16.67 percent of the value of crude oil exported as determined from the posted price.

Subject to certain limitations, section 901 of the Code permits domestic corporations to claim a credit for income taxes paid or accrued to foreign countries.

Whether a payment made to a foreign government qualifies as an income tax under section 901 of the Code depends on whether it is the substantial equivalent of an "income tax" as determined from an examination of the Federal income tax laws of the United States. E.g., Biddle v. Commissioner, 302 U.S. 573, 578 (1938), 1938-1 C.B. 309, and Bank of America Nat'l T. & S. Ass'n v. United States, 459 F.2d 513 518 (Ct. Cl. 1972), cert. denied, 409 U.S. 949 (1972).

To qualify as an income tax in the United States sense, amounts received by a foreign government must satisfy certain requirements. See generally, Rev. Rul. 78-61, 1978-8 I.R.B. . . . Among these requirements, the amounts must constitute a tax that is paid or accrued. The tax must be based upon gain or profit realized by the taxpayer. The tax must be structured to be almost certain of falling on net gain.

An income tax in the United States sense is not one that is intentionally structured to tax artificial or fictitious income. F. W. Woolworth v. Commissioner, 54 T.C. 1233 (1970), nonacq. on another issue, 1971-2 C.B. 4. The Woolworth case considered the creditability of Schedule A of the British Income Tax Act of 1952. Under that schedule a tax was levied on the rent derived from real property. However, if the property was owner-occupied or otherwise not rented, the tax fell not on actual income but on a fictitious amount, the imputed rental value of the property. The court denied credit for the tax stating that:

[t]he United States concept of "income" is based upon gain or profit realized by the taxpayer (i.e., net income as opposed to gross income, gross sales, or some other basis). . . . By no stretch of the imagination could it be said that the tax under Schedule A on the ownership of property as measured by its annual rental value, which may be an estimated figure, falls within the scope of this concept. F. W. Woolworth Co. v. Commissioner, at 1260. [Emphasis added.]

As previously stated, the income subject to the "surtax" is defined under Article 14(5) of the Libyan Petroleum Law, and Clause 5(a) of the Second Schedule to that Law, as total gross receipts with the further requirement that such receipts shall not be less than the number of barrels exported multiplied by the posted price less marketing allowances. Because the "surtax" imposed by Article 14(1)(A) of the Libyan Petroleum Law is levied on a base measured from an arbitrarily determined value (the posted price), the base on which the "surtax" is levied is artificial or fictitious. For example, when a concessionaire sells Libyan oil directly to unrelated parties at the market price, the concessionaire must pay the "surtax" on a base measured from the posted price even though the sales proceeds are less than the posted price. The Libyan "tax" base is not made any less fictitious or artificial by the fact that (1) some concessionaires actually sell the Libyan oil to their affiliates at the posted price, and (2) the affiliates then dispose of the oil at the lower market price, claiming losses equal to the difference. Although the purchasing affiliate makes a payment equal to the posted price in this situation, it does so only because it is required to do so by the persons who control both it and the concessionaire.

Gain on which the foreign tax is levied must be realized in the United States sense. Since the income subject to the "surtax" cannot be less than the number of barrels exported multiplied by the posted price less marketing allowances, the "surtax" may be triggered by the export of crude oil regardless of whether a sale has taken place. Thus, the requirement that the tax be imposed on realized income is not satisfied. See, Motland v. Commissioner, 192 F. Supp. 358, 361 (N.D. Iowa 1961), denying a credit for a Cuban tax triggered by the export of capital, and Keasbey & Mattison Co. v. Rothensies, 133 F.2d 894, 895, n. 1 and 898 (3rd Cir. 1943).

In Keasbey, the court denied a credit for the Quebec Mining Tax which was imposed on the gross value of mineral output, less allowable deductions, and which was triggered by shipment, use, or sale of that output. Gross value was computed from the ruling market prices of the minerals whether or not sold and, if sold, without regard to whether the sales proceeds were greater or lesser than the ruling market prices.

For these reasons, the "surtax" imposed by Article 14(1)(a) of the Libyan Petroleum Law is not the substantial equivalent of an income tax in the United States sense as required by section 901 of the Code. F. W. Woolworth; Motland; Keasbey.

The next question is whether the "surtax" is a tax in lieu of an income tax within the meaning of section 903 of the Code.

Section 903 of the Code provides, in part, that income taxes as used in section 901 shall include a tax paid in lieu of a tax on income otherwise generally imposed.

Section 1.903-1(a) of the Income Tax Regulations provides, in part, that the term "income tax" includes a tax imposed by statute or decree by a foreign country or by a possession of the United States if (1) such country or possession has in force a general income tax law, (2) the taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax, and (3) such general income tax is not imposed upon the taxpayer thus subject to such substituted tax.

An oil concessionaire is subject to both the Company Tax and the "surtax" with respect to the profits it derives from its operations in Libya. Thus, the "surtax" cannot qualify as a tax imposed in lieu of the Company Tax within the meaning of section 903 of the Code. See, sections 1.903-1(a)(2) and (3) of the regulations; Allstate Ins. Co. v. United States, 419 F.2d 409 (Ct. Cl. 1959); Rev. Rul. 58-3, 1958-1 C.B. 263.

Accordingly, the "surtax" imposed by Article 14(1)(a) of the Libyan Petroleum Law is neither an income tax in the United States sense nor a tax in lieu of an income tax. Therefore, it is not creditable under section 901 of the Code.

Rev. Rul. 68-552 is revoked. Pursuant to the authority contained in section 7805(b) of the Code this Revenue Ruling will be applied only to amounts paid or accrued to Libya for taxable years beginning on or after July 1, 1978, provided the taxpayer does not change the taxpayer's accounting period.

Rev. Rul. 55-296

Chapter I of Royal Decree No. 17/2/28/3321, dated November 4, 1950, as amended through September 2, 1970 (the November Decree), levies a tax at progressive rates on the combined Saudi source "personal income" and "income earned by investment of capitals," derived by individuals. Articles 1, 2, 3, 4, and 6 of the November Decree. Chapter I of the November Decree has been cancelled with respect to income earned by individuals after May 14, 1975.

Chapter II of the November Decree levies a tax at progressive rates currently set as high as 45 percent on the Saudi source "net profits" derived by all companies engaged in business in Saudi Arabia whose capital is non-Saudi (foreign companies). Article 11 of the November Decree.

In addition, under Royal Decree No. 17/2/28/7634, dated December 27, 1950, as amended through November 27, 1974 (the December Decree), foreign companies engaged in the production of oil and gas in Saudi Arabia and owned in whole or in part by non-Saudis (foreign oil companies) must also pay a so-called "additional income tax" on their "net operating income."

Articles 1 and 3 of the December Decree provide that if the total amount of duties, rents, income tax, Chapter II tax, other direct taxes, and that amount of royalties which exceeds 20 percent of the value of crude oil produced and sold for export does not equal 85 percent of an oil company's net operating income, then such company must pay Saudi Arabia "additional income tax" sufficient to make its total payments equal 85 percent of its net operating income. Thus, the December Decree assures that Saudi Arabia will receive at a minimum 85 percent of a foreign oil company's net operating income.

Except for differences not here relevant, the statutory provisions of both Chapter II of the November Decree and the December Decree are essentially identical to the statutory provisions of the December Decree, and Chapter II of the November Decree, respectively, in effect when Rev. Rul. 55-296 was issued.

No United States company engaged in producing oil and gas in Saudi Arabia computes the levies imposed, respectively, by the December Decree and by Chapter II of the November Decree exactly as provided by the above decrees. Instead, both the December Decree and Chapter II of the November Decree, as they apply to such companies, have been modified by individual agreements and understandings between each of the companies and the Saudi Government and, since 1973, by directives issued to each of the oil companies by that Government. It is understood that these agreements are not contractual agreements in the ordinary sense, but rather are imposed upon the oil companies by the Saudi Government.

Under the individual agreements and understandings discussed above, United States oil companies engaged in producing oil and gas in Saudi Arabia pay "Chapter II tax" calculated at a flat 20 percent rate. By contrast, companies engaged in other business activities in Saudi Arabia are required to pay such tax at progressive rates as high as 45 percent.

Also, a United States company engaged in producing oil and gas in Saudi Arabia is required by the above agreements and understandings to sell in Saudi Arabia all oil destined for export. Additionally, for the purposes of such sales and for the computation of "net profits" under Chapter II of the November Decree, and thus "net operating income" under the December Decree, the oil companies have been required, at least up until 1977, to use a posted price established by the Saudi Government. Posted price is a fixed price generally in excess of the actual price (market price) that an unrelated purchaser would ordinarily pay such companies for a barrel of Saudi crude oil.

Posted price is an arbitrary value placed on a barrel of crude oil which has been used for the purpose of computing a foreign oil company's "income tax" under Chapter II of the November Decree and its "additional income tax" under the December Decree, each as modified by the aforementioned agreements, understandings, and directives.

Foreign oil companies must also pay Saudi Arabia a per barrel royalty currently fixed at 20 percent of the posted price.

Neither the "income tax" nor the "additional income tax" imposed, respectively, on foreign oil companies by Chapter II of the November Decree, and by the December Decree, each as modified by the aforementioned agreements, understandings, and directives, has been imposed upon income in the United States sense. As is stated above, an income tax in the United States sense is not one that is intentionally structured to tax artificial or fictitious income. Accordingly, these Saudi "taxes" are not substantial equivalents of income taxes in the United States sense as required by section 901 of the Code.

The next question is whether amounts received by Saudi Arabia from foreign oil companies under Chapter II of the November Decree, as modified, and under the December Decree, as modified, respectively, are taxes in lieu of income taxes within the meaning of section 903 of the Code.

Saudi Arabia has no generally imposed income tax. Instead, it imposes a series of separate taxes restricted to limited classes of taxpayers. Companies wholly owned by Saudis are required to pay the Islamic religious tax known as the Zakat. Article 2 of Royal Decree No. 17/2/28/8634, dated April 24, 1951, as implemented by Royal Decree No. 17/2/28/8799, dated June 15, 1951. Only foreign companies engaged in activities in Saudi Arabia other than the production of oil and gas are required to pay the income tax imposed by Chapter II of the November Decree. Only foreign companies engaged in the production of Saudi oil and gas are required to pay the "taxes" imposed, respectively, by Chapter II of the November Decree, as modified, and the December Decree, as modified.

Since there is no generally imposed Saudi income tax in the United States sense for which the "taxes" on foreign oil companies imposed, respectively, by Chapter II of the November Decree, as modified, and the December Decree, as modified, are substitutes, such "taxes" cannot qualify as in lieu of "taxes" within the meaning of section 903 of the Code.

Accordingly, the levies imposed on oil companies by Chapter II of the November Decree, as modified, and by the December Decree, as modified, respectively, have been neither income taxes in the United States sense nor taxes in lieu of such income taxes in the United States sense.

Rev. Rul. 55-296 is revoked. However, pursuant to the authority contained in section 7805(b) of the Code, this Revenue Ruling will be applied only to amounts paid or accrued to Saudi Arabia for taxable years beginning on or after July 1, 1978, provided the taxpayer does not change the taxpayer's accounting period.

The holdings of this Revenue Ruling with respect to section 901 of the Code are limited to the questions discussed herein and no opinion is expressed as to whether the amounts received by Libya and Saudi Arabia might fail to qualify as creditable income taxes for any other reasons.

Rev. Rul. 68-552 is revoked. Rev. Rul. 55-296 is revoked.